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Supreme Court, U.S.
FILED
MAY 27 1999
CLERK

No. 98-1680

# In The Supreme Court of the United States

OCTOBER TERM, 1998

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## SAM SKURNICK,

*Petitioner,*

v.

## MARTIN RAAKE,

*Respondent.*

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

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## RESPONDENT'S BRIEF IN OPPOSITION

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**Martin Raake**
**Respondent, filing pro se**
**5230 N. E. 17th Terrace**
**Ft. Lauderdale, FL 33334**
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JIAP

## LIST OF THE PARTIES

The caption of the case contains the names of all of the parties.

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## STATEMENT OF THE CASE

The Appellee (hereinafter referred to as Raake) originally filed a multi-count complaint against the Appellant (hereinafter referred to as Skurnick) in the United States District Court for the Southern District of Florida, case no: 86-6772-CIV, alleging violations of Section 12(2) of the Securities Act, Section 10(b) of the Exchange Act, Florida Statutes 517.12 and 517.301, breach of fiduciary duties, fraud and deceit, and negligence. This complaint was filed in September of 1986.

In response to the complaint, one of the pleadings filed on behalf of Skurnick was a Motion to Stay Action Pending Arbitration. The District Court granted this motion on December 30, 1997. An appeal of this order was taken by the Raake and was ultimately dismissed by the 11th Circuit Court of Appeals in a Judgment dated June 23, 1989.

Upon the dismissal of the appeal referenced above, Raake filed a demand for arbitration with the American Arbitration Association (hereinafter referred to as "AAA") on or about September 27, 1989. In this demand, Raake, in describing the nature of the dispute, attached a copy of the original verified complaint filed in the District Court and also made an additional claim against Skurnick for violation of the Ohio securities laws. The attorney representing Raake executed this demand for arbitration.

During the preliminary proceedings in the arbitration process, Skurnick raised various objections with the AAA, which the AAA either addressed by providing a written decision prior to the hearing date or by indicating that the issue could be raised and addressed at the hearing itself. The record, in arbitration, clearly reflects that Skurnick actively and extensively participated in the pre-hearing process.

On September 18 through 20, 1990, the AAA conducted an arbitration hearing. However, for some unexplained reason, Skurnick decided not to attend the final

hearing thereby effectively precluding himself from resolving any open procedural issues and presenting a defense to the claim of Raake.

On October 11, 1990, the arbitration award was forwarded to the parties. It provided in relevant part:

> The Claimant, MARTIN RAAKE, shall recover from Respondent, SAM SKURNICK, the sum of TEN THOUSAND DOLLARS AND NO CENTS ($10,000).

Thereafter, Raake filed a motion, in the District Court, seeking to Reopen Case and to Confirm Arbitration Award in Part and to Vacate Arbitration Award in Part. This motion was granted and the District Court entered judgment against Skurnick. Skurnick then filed an appeal, of this judgment, with the 11th Circuit Court of Appeals, Case Nos: 94-4283 and 94-4504. As part of this appeal, Skurnick made the same arguments relating to the underlying facts as he is now making to this Court. For a totally separate legal reason, the 11th Circuit vacated the judgment of the District Court and reinstated the original arbitration award. The decision of the court and the mandate are contained in the appendix.

Upon receiving the mandate, Raake filed a motion with the district court seeking to have the court comply with the mandate to reduced the original arbitration to a judgment. This motion was granted based on the mandate and judgment was entered against Skurnick. The judgment is included in the appendix.

From this judgment Skurnick filed another appeal with the 11th Circuit Court of Appeals, Case No: 98-4685. This appeal, in effect, was asking the court of appeals to review a judgment that was entered in conformance with an earlier mandate of the same court.

In response to this notice of appeal, Raake filed a motion to dismiss the same based upon the fact that the final

judgment being appealed was nothing more than a judgment based upon an earlier mandate of the same court. A copy of this motion is included in the appendix. This motion was granted by the court of appeals on October 20, 1998. Thereafter, Skurnick filed a Suggestion of Hearing En Banc, which was denied by the court of appeals on January 19, 1999. It is this most recent action, by the court of appeals, which is the subject of this appeal.

## REASONS FOR DENYING THE WRIT

Skurnick has presented a confusing and misleading Statement of the Case. As is referenced in Raake's Statement of the Case, this entire appeal is predicated upon Skurnick's appeal of a Final Judgment entered by the District Court which was based upon a mandate issued by the 11th Circuit Court of Appeals in case nos: 94-4283 and 94-4504. When the 11th Circuit Court of Appeals was advised that this was the basis of Skurnick's appeal, the Court dismissed the same.

At both the District Court and appellant level, Skurnick was given the opportunity and did in fact respond in writing to Raake's Motion for Order and Judgment to Comply with Mandate and Raake's Motion to Dismiss the Appeal. Therefore, for Skurnick to imply that he did not fully and completely present his position to both courts is misleading.

Skurnick's other issue apparently concerns the fact that Skurnick did not participate in the suit. It is impossible for Raake to deal with this issue as Skurnick has been raising this issue since the arbitration matter was initiated. At each and every level referenced in Raake's Statement of the Case, either the arbitration panel, the District Court or the Appellant Court considered this argument and rejected the same.

## CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,
Martin Raake
Respondent, filing pro se
5230 N.E. 17th Terrace
Ft. Lauderdale, Fl 33334
(954) 771-0358
May 27, 1999

# APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-4283 & 94-4504

D.C. Docket No. 86-6772-CIV-GRAHAM

David Wolfe, as Administrator for the Estate of Lloyd Raake and Martin Raake, Lloyd Raake, Martin Raake,

Plaintiffs-Appellees,

v.

Sam Skurnick,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

(December 7, 1995)

Before ANDERSON and BARKETT, Circuit Judges, and YOUNG*, Senior District Judge.

*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

The instant case is an appeal from the district court's vacation in part of an arbitration award. The arbitrators awarded Martin Raake $10,000 damages for appellant's violation of Florida Statute § 517.12, but awarded Lloyd Raake no damages. The district court, adopting the magistrate judge's report and recommendation, vacated the arbitration award in part and granted damages to Lloyd Raake (or his estate) in the amount of $84,824.77, plus interest, and awarded damages to Martin Raake in the amount of $9,436.16, plus interest. Attorney fees were also awarded in favor of plaintiffs-appellees.

We conclude that this case must be reversed. This case is controlled by Brown v. Rauscher Pierce and Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993), rather than by Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992). As in Brown, at the time of the arbitration award in this case, the Florida law relating to the damages under this statute was not established. As stated in Brown:

> [A]t the time the [arbitration] Panel rendered its decision, Ainsworth [960 F.2d 939 (11th Cir. 1992)] had not yet been decided. As there was no definitive interpretation of the statute, the Panel's interpretation was not wholly unfounded. Thus, we cannot say that the Panel's award was arbitrary and capricious.

994 F.2d at 781. In this case, the final arbitration award was entered on November 8, 1990. The Florida law was established at the earliest in Skurnick v. Ainsworth, 591 So.2d 904 (Fla. 1991). That opinion issued on September 12, 1991, and rehearing was denied on November 14, 1991. The opinion answered a question certified by this court, which answer was then embodied in our opinion in Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992).

Accordingly, this case is in precisely the same posture as was Brown, and is controlled by it. Therefore, the judgment of the district court is reversed, including its award of attorney's fees, and this case is remanded to the district court with instructions to reinstate the award of the arbitrators.[1]

REVERSED AND REMANDED.

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[1]Appellant's other arguments are without merit. Appellant argues that he was not given notice, as required by Rule 22 of the Securities Arbitration Rules of the American Arbitration Association, that the Raakes would be represented by counsel at the arbitration hearings. However, Rule 22 states that the notice requirement is satisfied when the representative "initiates an arbitration or responds for a party." In this case the magistrate judge found that attorneys for the Raakes filed the Demand for Arbitration. In doing so, they satisfied the notice requirement of Rule 22

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-4283 & 94-4504

D.C. Docket No. 86-6772-CIV-GRAHAM

David Wolfe, as Administrator for the Estate of Lloyd Raake and Martin Raake, Lloyd Raake, Martin Raake,

Plaintiffs-Appellees,

v.

Sam Skurnick,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

Before ANDERSON and BARKETT, Circuit Judges, and YOUNG*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby REVERSED; and that these causes be and the same are hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay defendant-appellant the costs on appeal to be taxed by the Clerk of the Court.

*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

Entered: December 7, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/8/96

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARTIN RAAKE, ET AL.,
Plaintiffs,

vs.

Case No.: CL 86-6772-CIV-GRAHAM

SAM SKURNICK,
Defendant.

MOTION FOR ORDER AND JUDGMENT TO COMPLY WITH MANDATE AND MEMORANDUM OF LAW IN SUPPORT THEREOF

The Plaintiff, Martin Raake, moves this Court for the entry of an Order confirming the subject arbitration award and entering Final Judgment thereon. In support of this Motion, the Plaintiff would allege as follows:

1. In the unpublished opinion issued by the Eleventh Circuit Court of Appeals, in this matter, the Appeals Court reversed and remanded this matter to the District Court as referenced by the enclosed opinion.

2. As reflected in the enclosure, the Eleventh Circuit Court of Appeals specifically directed the Court to reinstate the subject arbitration award. In that regard, the Plaintiff moves this Court for an Order reinstating and confirming the subject arbitration award and entering a Final Judgment thereon in accordance with the affidavit filed in support of this Motion.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by US Mail, this 14th day of May, 1997 to Sam Skurnick, Pro Se, 300 5th Avenue, No. 6030, Boca Raton, FL 33432; Steven R. Berger, Berger & Chafetz, Suite 1500, NationsBank Building, 9350 South Dixie Highway, Miami, FL 33156.

Russell L. Forkey, PA
2888 East Oakland Park Blvd.
Ft. Lauderdale, FL 33306
FBN: 146757
(305) 568-4441

/s/
Russell L. Forkey, Esquire

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARTIN RAAKE, ET AL.,
Plaintiffs,

vs.

Case No.: CL 86-6772-CIV-GRAHAM

SAM SKURNICK,
Defendant.

This Cause came before the Court upon Plaintiff's, Martin Raake, Motion for Order and Judgment, filed May 19, 1997.

The Court has reviewed the Motion, the pertinent portions of the record, and is otherwise fully advised of the premises.

On June 29, 1993, this court entered and Order Affirming Magistrate's Report and Recommendation (D.E. 121) and vacated the arbitration award in part and granted damages to Lloyd Raake (or his estate) in the amount of $84,824.77, plus interest, and awarded damages to Martin Raake in the amount of $9,436.26, plus interest. This Court also granted Plaintiffs attorney's fees.

The Eleventh Circuit relied on Brown v. Rauscher Peirce and Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993) and reversed this Court's Order Affirming Magistrates Report And Recommendation (D.E. 121). The Eleventh Circuit remanded the case to this Court with instructions to reinstate the award of the arbitrators.

In light of the above, it is

ORDERED AND ADJUDGED that Defendant's Motion for Dismissal of Motion for Order and Judgment filed May 29, 1997 is hereby DENIED. It is further,

ORDERED AND ADJUDGED that plaintiff's, Martin Raake, Motion for Order and Judgment filed May 19, 1997 is GRANTED. It is further

ORDERED AND ADJUDGED that the Clerk of Court shall REINSTATE the Award of the Arbitrators and AFFIRM the decision of the arbitration panel.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of February, 1998.

/s/
Donald L. Graham
United States District Judge

cc: Hon. William C. Turnoff
All counsel of record

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARTIN RAAKE, ET AL.,
Plaintiffs,

vs.

Case No.: CL 86-6772-CIV-GRAHAM

SAM SKURNICK,
Defendant.

FINAL JUDGMENT

This cause came on for consideration before the Court upon Plaintiff's Motion for Order and Judgment (D.E. 176), filed May 19, 1997.

The Court has considered the issues, the pertinent portions of the record, and is otherwise fully advised in the premises. Therefore, it is

Ordered and Adjudged that Plaintiff is awarded a judgment against Defendant Sam Skurnick in the total amount of $25,525.74, which includes:

(1) The subject award of $10,000.00;
(2) Administrative fees and expenses of the American Arbitration Association totaling $3,000.00;
(3) The award includes $1,800.00 for fees previously paid by the Plaintiff;
(4) The award further includes interest on the balance of $14,800.00, from October 2, 1990 to May 6, 1997, in the amount of $10,725.74.

Done and Ordered in Chambers at Miami, Florida, this 23rd day of March, 1998

/s/
Donald L. Graham
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARTIN RAAKE, ET AL.,
Plaintiffs,

vs.

Case No.: CL 86-6772-CIV-GRAHAM

SAM SKURNICK,
Defendant.

NOTICE OF APPEAL

Defendant, Sam Skurnick, acting Pro Se, hereby notifies the court that he will appeal the "Final Judgment" entered by this court in the above case on March 23, 1998.

The fee of $105.00 is enclosed to the Clerk of the Court.

/s/
Sam Skurnick, Defendant
300 S. E. 5th Avenue
Boca Raton, Florida 33432
(561) 391-3255

I hereby certify that a copy of the above has been sent by mail to Russell L. Forkey, PA at 2888 E. Oakland Park Blvd., Ft. Lauderdale, FL 33306 on April 20, 1998

ELEVENTH CIRCUIT COURT OF APPEALS

MARTIN RAAKE, ET AL.,
Plaintiffs,

vs. - Case No. 98-4685
LTCase No.: CL 86-6772-GRAHAM

SAM SKURNICK,
Defendant.

MOTION TO DISMISS APPEAL AND MEMORANDUM OF LAW IN SUPPORT THEREOF

The Appellee, Martin Raake, hereby moves this Court for an Order dismissing the subject appeal. In support of his Motion, the Appellee would allege as follows:

ARGUMENT

The Appellee, hereby files this Motion to Dismiss pursuant to Rule 27 of the Rules of Appellant Procedure and Rule 27-1 of the United States Court of Appeals, Eleventh Circuit. This Motion is predicated upon the fact that the final judgment appealed from is simply the trial court implementation of a mandate issued by this Court in a previous proceeding.

On December 7, 1995, this Court entered the enclosed Order reversing various decisions by the District Court and directing that the original arbitration award be reinstated. A copy of said Order is attached hereto as Exhibit No. 1.

Based upon this Order, the Appellee filed a request, with the District Court, to reinstate the original arbitration award. This request was granted by the entry of the Order appealed from herein.

The entry of the Final Judgment herein was basically nothing more than a ministerial act directed by this court in reinstating the original arbitration award and entering judgment thereon.

Wherefore, the Appellee moves this Court for an Order dismissing the subject appeal.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by US Mail this 5th day of June, 1998 to:

Sam Skurnick, Pro Se
300 S.E. 5th Ave., No. 6030
Boca Raton, FL 33432

Russell L. Forkey, PA
2888 E. Oakland Park Blvd.
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FBN: 146757
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/s/
Russell L. Forkey, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-04658

Filed: 10/20/98

Lloyd E. Raake,
Martin Raake,
Plaintiffs-Appellees,

v.

Sam Skurnick,
Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Florida

Before: Anderson, Edmondson and Dubina, Circuit judges.

By the Court:

Appellee Martin Raake's Motion to Dismiss this appeal is GRANTED.

Appellant's Motion for stay of judgment pending appeal is DENIED AS MOOT.